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No. 01-1840

IN THE

Supreme Court of the United States

DELTA FAMILY-CARE DISABILITY AND SURVIVORSHIP PLAN,

Petitioner,

v.

FRANK REGULA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION OF BERT BELL/PETE ROZELLE NFL PLAYER RETIREMENT PLAN FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF BERT BELL/PETE ROZELLE NFL PLAYER RETIREMENT PLAN IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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MOTION OF BERT BELL/PETE ROZELLE NFL PLAYER RETIREMENT PLAN FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The Bert Bell/Pete Rozelle NFL Player Retirement Plan ("NFL Player Retirement Plan" or "Plan") hereby respectfully moves for leave to file the attached brief *amicus curiae* in this case. The consent for the attorney for petitioner has been obtained. The consent of the attorney for the respondent was requested but refused.

The NFL Player Retirement Plan benefits present and former players in the National Football League ("NFL"). The Plan is maintained under collective bargaining agreements between the NFL Management Council, the bargaining representative of the NFL clubs, and the National Football League Players Association, the bargaining representative of the NFL players. The Plan provides disability benefits to

players who become totally disabled during the course of their playing careers and to former players whose total disabilities arise after their playing careers have ended.

In the instant case, the court of appeals ruled that disability benefit plans subject to the Employee Retirement Income Security Act of 1974 ("ERISA") must apply the "treating physician" rule applicable to the adjudication of claims for Social Security disability benefits when determining eligibility for disability benefits under private, employer-sponsored benefit plans. The treating physician rule is embodied in a regulation promulgated by the Social Security Administration and is designed for the purposes of the public Social Security program. The imposition of this rule on private employee benefit plans subject to an entirely different regulatory regime administered by a different federal agency represents an unwarranted interference with the Congressional objectives embodied in ERISA.

Six other courts of appeals have considered and rejected the notion that the treating physician rule should apply to ERISA disability plans. Following the Ninth Circuit's decision in this case approving the rule, one other circuit has joined the Ninth Circuit's minority position. This conflict threatens to impose incompatible standards of conduct on the large number of plans that provide disability benefits to participants throughout the United States. The NFL Player Retirement Plan, whose participants can be found in every federal circuit, and which is often involved in litigation concerning disability benefits in courts all over the country, believes that its experience with the administration of a complex and carefully developed plan of disability benefits can provide the Court with additional insight into the problems inherent in the Ninth Circuit's decision.

Respectfully submitted,

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BRIEF *AMICUS CURIAE* OF BERT BELL/PETE ROZELLE NFL PLAYER RETIREMENT PLAN IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

INTEREST OF THE *AMICUS CURIAE* [1]

The Bert Bell/Pete Rozelle NFL Player Retirement Plan ("NFL Player Retirement Plan" or "Plan") benefits present and former players in the National Football League ("NFL").

[1] Pursuant to Rule 38.6, (1) counsel for a party to this case has not authored this brief in whole or in part, and (2) no person or entity other than the *amicus curiae* has made a monetary contribution to the preparation or submission of this brief.

The Plan is maintained under collective bargaining agreements between the NFL Management Council ("NFLMC"), the bargaining representative of the NFL clubs, and the National Football League Players Association ("NFLPA"), the bargaining representative of the NFL players.

In addition to pension benefits, the NFL Player Retirement Plan provides disability benefits to eligible players. Vested Players who are unable to work, under the terms of the Plan, receive total and permanent disability benefits until they reach the Plan's normal retirement age of 55. These benefits are paid even if the player's disability is not related to football and even if the player becomes unable to work decades after his NFL career ends. The Plan also provides up to 90 months of payments to eligible players who incur a "substantial disablement" arising out of NFL football, even if they are able to work.

The collective bargaining agreements, and the current Plan document, reflect decades of care by the NFLMC and the NFLPA to shape these disability benefits. Annual benefits for total and permanent disability currently range from $18,000 to over $224,000. The amount each eligible player receives depends on a variety of factors, such as what caused the disability and how soon after leaving NFL football the player became unable to work. There are special rules and exceptions forged through collective bargaining. For example, players who are unable to work because of alcohol abuse or the use of illegal drugs generally receive a lesser benefit. Because of IRS limits, the NFLMC and the NFLPA have also established a companion plan—the NFL Player Supplemental Disability Plan—that only pays disability benefits in excess of the limits for retirement plans. The NFL Player Retirement Plan makes all eligibility and classification decisions for disability benefits.

In accordance with federal law, the NFL Player Retirement Plan is jointly administered by representatives of its Plan

sponsors, and has detailed procedures for the processing and review of all benefit claims. A Disability Initial Claims Committee ("Committee") makes initial decisions on claims for disability benefits. This Committee has two voting members—one appointed by the NFLPA and one appointed by the NFLMC. A player who is dissatisfied in any way with a decision of the Committee may appeal to the Retirement Board. The Retirement Board has six voting members—three appointed by the NFLPA and three appointed by the NFLMC. The members of the Retirement Board serve without pay and average over 20 years each in NFL-related experience, in positions such as a player, coach, agent, or owner.

The Plan maintains a national network of qualified physicians to review each claim for disability benefits. If a player appeals a decision of the Committee, that player is sent to a second physician in this network for a completely independent examination and review. Of course, players are invited to submit any evidence they wish in support of their claim, including reports of their treating physician.

In the 40 years of its existence, the NFL Player Retirement Plan has been sued by many players seeking additional disability benefits. To minimize the cost of this litigation, the Plan's sponsors—the NFLMC and the NFLPA—have deliberately given the Committee and the Retirement Board the broadest possible discretion in deciding claims. Pursuant to this Court's decision in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989), decisions of the Retirement Board have been reviewed with deference under the arbitrary and capricious/abuse of discretion standard. Because the NFL Player Retirement Plan is jointly administered by a Retirement Board composed of equal numbers of labor and management members, courts have routinely held that the Retirement Board is not subject to a conflict of interest that might warrant less deferential judicial review. *See, e.g.*,

Courson v. Bert Bell NFL Player Retirement Plan, 75 F.Supp.2d 424, 431 (W.D. Pa. 1999), *aff'd*, 214 F.3d 136 (3d Cir. 2000).

The decision below will in many cases eliminate the discretion given to the Committee and the Retirement Board by the Plan's sponsors and settlers—the NFLMC and the NFLPA. The structure intended by these collective bargaining parties will be replaced by a requirement of deference to the views of a treating physician selected by the player. Litigation will increase and different rules will apply in different circuits. The NFL Player Retirement Plan therefore has a keen interest in the issue of whether the treating physician rule applies to ERISA plans.

INTRODUCTION AND SUMMARY OF ARGUMENT

The court of appeals' decision, written by Judge Betty Fletcher, applies a rule created by the Social Security Administration ("SSA") to the claims decisions of disability plans voluntarily created by employers for their workers. This SSA rule, which is commonly referred to as the "treating physician rule," requires a high degree of deference to the views of the treating physician when deciding whether the claimant is entitled to disability benefits. For example, in the decision below, the Ninth Circuit found that the plan improperly relied on the reports of the independent examining physicians, and should have deferred to the views of the claimant's treating physician. Pet. App. 30a.

However, voluntary plans are governed by a different statutory scheme, the Employee Retirement Security Act of 1974, as amended ("ERISA"). ERISA is based on trust law and allows employers, as plan settlors, to determine the standards for benefits and whether trustees should be able to exercise discretion in deciding claims. ERISA provides protections for participants and specific procedures for

deciding claims. The Department of Labor has authority over claims procedures, and has issued detailed rules governing the consideration of disability claims.

Review of the decision is warranted for the following reasons.

I. There is a sharp conflict among the circuits on this core ERISA issue. The Third Circuit has endorsed the decision below, while six other circuit courts have rejected it.

II. The decision below violates important principles and precedents.

- In violation of ERISA Section 404(a)(1)(D), 29 U.S.C. § 1104 (a)(1)(D), it requires plan trustees and courts to disregard plan language governing the payment of benefits in favor of the opinions of a treating physician with respect to his patient.
- In violation of ERISA Section 503, 29 U.S.C. § 1133, it vests the Social Security Administration with de facto regulatory authority over ERISA plans. In ERISA Section 503, Congress granted the Department of Labor such authority. The decision below is incompatible with DOL's governing regulation. The DOL's scheme of two levels of review, and two independent medical examinations, is not compatible with the concept that a treating physician's opinion may be controlling.
- In violation of this Court's decision in *Firestone*, it eliminates the ability of a disability plan settlor to give trustees broad discretion in deciding claims.

III. The decision below will have adverse and unintended effects on ERISA disability benefit plans. Collectively bargained plan provisions will be invalidated. Benefit costs will increase because benefits will be paid to persons who were never intended to receive benefits. Litigation costs will

also increase as claimants challenge trustee decisions in different circuits by obtaining favorable reports from their treating physicians. These costs may cause employers to reduce benefits or terminate plans.

ARGUMENT

I. THE DECISION BELOW CREATES A CONFLICT AMONG THE CIRCUITS ON AN IMPORTANT NATIONAL ISSUE.

Over 38 million workers in this country are protected by disability plans voluntarily established by their employers. "Employee Benefits in Private Industry, 1999," United States Department of Labor, Bureau of Labor Statistics (Dec. 19, 2001). These plans range from extremely generous and complex schemes, such as the benefits of the NFL Player Retirement Plan, to more routine plan designs providing income replacement benefits where a worker cannot perform (depending on the plan terms) either his or her previous job or any job, to plans providing fixed benefits for specific disabilities, such as the loss of a limb. Disability benefits are a frequent subject of litigation.

The conflict in the Circuit Courts of Appeal on the treating physician issue is clear and growing. Prior to the decision below, five Circuits—the Fourth, Fifth, Seventh, Eighth and Eleventh Circuits—rejected the use of the treating physician rule in ERISA disability and health cases. *Delta Family-Care Disability and Survivorship Plan v. Marshall*, 258 F.3d 834, 842 (8th Cir. 2001) (involving the same plan as in this case); *Elliott v. Sara Lee Corp.*, 190 F.3d 601, 607 (4th Cir. 1999); *Wilczynski v. Kemper National Insurance Companies*, 178 F.3d 933, 938 (7th Cir. 1999); *Dowden v. Blue Cross & Blue Shield of Texas, Inc.*, 126 F.3d 641, 644 (5th Cir. 1997) (per curiam); *Salley v. E.I. DuPont de Nemours & Co.*, 966 F.2d 1011, 1016 (5th Cir. 1992); *Jett v. Blue Cross and Blue Shield*

of Alabama, Inc., 890 F.2d 1137, 1140 (11th Cir. 1989). Prior to the decision below, no Circuit had applied the treating physician rule to ERISA disability or health cases.

Since the Ninth Circuit's decision, the Sixth Circuit has rejected the use of the treating physician rule. *Jackson v. Metropolitan Life*, 2001 WL 1450811 *2 (6th Cir. Oct. 29, 2001). The Eleventh Circuit has reaffirmed its rejection of the treating physician rule in ERISA cases. *Turner v. Delta Family-Care Disability and Survivorship Plan*, 291 F.3d 1270, 1274 (11th Cir. 2002) (involving the same plan as in this case).

However, the Third Circuit has endorsed the treating physician rule. *Skretvedt v. E.I. DuPont de Nemours and Company*, 268 F.3d 167, 184 (3d Cir. 2001) (citing the decision below). The Ninth Circuit followed its decision in *Regula* in *Nord v. Black & Decker Disability Plan*, 2002 WL 1492164 (9th Cir. July 15, 2002).

There are thus six Circuits that have rejected the use of the treating physician rule in ERISA cases, and two Circuits that have adopted it. This established and irreconcilable circuit split exposes benefit plans to conflicting standards when deciding claims for disability benefits under ERISA. The split frustrates "one of the principal goals of ERISA": establishing a "uniform administrative scheme, which provides a set of standard procedures to guide processing of claims and disbursement of benefits." *Egelhoff v. Egelhoff*, 532 U.S. 141, 148 (2001) (quoting *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 9 (1987)).

The Ninth Circuit refused an invitation to review its decision en banc. Only this Court has the ability to harmonize this important area of the law. We urge the Court to grant the Petition for Writ of Certiorari.

II. THE DECISION BELOW VIOLATES ESTABLISHED PRECEDENT BECAUSE IT STRIPS PLAN SETTLORS OF THEIR ABILITY TO SET STANDARDS FOR DISABILITY DETERMINATIONS.

Congress has given the Social Security Administration ("SSA") authority to set standards for the payment of disability benefits under the federal Social Security program. 42 U.S.C. § 405(a). In 1991, pursuant to this authority the SSA established, by regulation, the treating physician rule. In part, this rule states that "[g]enerally, we give more weight to opinions from your treating sources . . . If we find that a treating source's opinion on the issue(s) of the nature and severity of your impairment(s) is well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in your case record, we will give it controlling weight." Pet. App. 96a (20 C.F.R. section 404.1527(d)(2)).

SSA has no authority over voluntary plans established by private employers, and its rules do not apply to such plans. Voluntary plans are subject to the comprehensive rules of the Employee Retirement Income and Security Act of 1974, as amended ("ERISA"). The decision below violates ERISA in several respects.

A. ERISA does not require that an employer establish any disability, health, or retirement plans. *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995); *Lockheed Corp. v. Spink*, 517 U.S. 882, 890 (1996); *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 443-44 (1999). However, if an employer voluntarily offers employees a benefit plan, the plan's fiduciaries must administer the plan in accordance with the terms of the plan, unless prohibited by ERISA. 29 U.S.C. § 1104(a)(1)(D). ERISA thus codifies a basic principle of trust law regarding trustee responsibility. *See* Restatement (Revised Second) of Trusts § 541 ("A fundamental duty of

the trustee is to carry out the directions of the testator or settlor as expressed in the terms of the trust."); *Firestone*, 489 U.S. at 110 ("ERISA abounds with the language and terminology of trust law.").

The decision below squarely and improperly rejected the fundamental trust law principle that the specific language of an ERISA plan must be followed when reviewing claims for benefits:

> "[I]n the context of a disability claim such as Regula's, the key issue in determining whether a claimant is entitled to benefits is not the language of the plan, but the facts of the particular case. Hence, just as in Social Security cases, the issue in dispute in this case is not the meaning of the terms of the plan but whether the facts of Regula's case entitled him to benefits."

Pet. App. 18a. The decision below violates ERISA's fundamental directive that trustees must follow plan language unless otherwise directed by ERISA.

B. Congress has authorized the Department of Labor ("DOL"), not the SSA, to set standards for processing claims under ERISA plans. 29 U.S.C. § 1133. The DOL has issued elaborate procedures for handling disability claims under ERISA. Pet. App. 70a-95a (29 C.F.R. § 2560.503-1). For example, disability plans must offer claimants at least two levels of review by independent decision-makers, and perform an independent second medical examination on appeal. No DOL regulation or other authority has ever imposed any form of a treating physician rule on voluntary disability plans subject to ERISA.

The decision below is in direct conflict with Congress' directive to place the DOL in charge of the procedures for processing claims for ERISA benefits. Simply put, the decision below makes SSA an ERISA regulator. SSA may change, withdraw, or expand the treating physician rule,

thereby unwittingly changing the terms of ERISA disability plans. But Congress nowhere gave SSA such authority with respect to ERISA plans voluntarily established by private employers.

Moreover, the DOL regulations on processing claims for disability benefits under ERISA plans are not compatible with SSA's treating physician rule. The SSA rule requires deference to the views of a treating physician, who may in effect overrule the physician(s) selected by the ERISA plan pursuant to the regulations of the DOL (as in the decision below). The decision below thus improperly imposes on plan administrators and courts a particular method of weighing the evidence in the plan administrative record. This method may cause an award of benefits regardless of the terms of the plan.

C. The decision below violates this Court's decision in *Firestone*. In that case this Court determined that plan settlors may grant their designated trustees discretion to interpret plans and decide benefits, and that the general standard of judicial review where such discretion has been granted is the arbitrary and capricous/abuse of discretion standard. 489 U.S. at 115. *Firestone* is also based on the trust principle that a plan settlor may establish binding plan terms.

The decision below squarely holds that, even where the plan settlor explicitly gives the trustees discretion to decide claims, that discretion must be turned over to the treating physician. Indeed, if properly documented, the treating physician's views may be "controlling." The decision below cannot be reconciled with this Court's decision in *Firestone*.

III. THE DECISION BELOW STRIKES COLLECTIVELY-BARGAINED PLAN PROVISIONS AND INCREASES THE COSTS OF DISABILITY PLANS.

The decision below extends the treating physician rule to all ERISA plans, including collectively-bargained plans that provide disability benefits like the NFL Player Retirement Plan. The Ninth Circuit's sweeping decision will have far-ranging effects on collectively-bargained disability benefits in particular, and on ERISA disability benefit plans in general.

The collective bargaining parties and settlors of the NFL Player Retirement Plan—the NFLPA and the NFLMC—have over decades very carefully and intentionally developed complex rules and generous provisions for the payment of disability benefits to eligible players. There are detailed rules regarding when a player is unable to work. For example, payments by an NFL club or a charitable organization may be disregarded in determining whether a player is capable of gainful employment. There are detailed rules as to when a disability arises from NFL football and entitles the player to a higher level of benefits. There are detailed rules that provide higher benefits to a player who is unable to work shortly after his NFL career ends. There are detailed rules that reduce benefits in some cases where a disability arises from abuse of alcohol or illegal drugs.

It is not, and never was, the intent of the NFLPA and the NFLMC to allow treating physicians to determine how these rules apply to players. The settlors of the NFL Player Retirement Plan intend that these decisions will be made by the Committee and the Retirement Board. The members of the Committee and the Retirement Board have extensive experience in reviewing claims. In addition, the NFLPA and the NFLMC have established a dispute resolution mechanism in which deadlocks with respect to a player's medical condition are resolved by a Medical Advisory Physician

("MAP") jointly appointed by management and labor. Under the terms of the Plan, a MAP's medical determination is final and binding on the Retirement Board. The treating physician rule renders the MAP mechanism ineffective, because it would set aside MAP determinations that are different than a treating physician's determinations.

The industry-specific disability rules developed over time for the NFL Player Retirement Plan are not unique. Other plans covering employees in other industries have similar specialized rules. For example, the collectively-bargained plan covering tens of thousands of bituminous coal miners provides disability benefits only to miners who become "totally disabled as a result of a mine accident," and the trustees of the plan have adopted detailed interpretative rules explaining how this standard is applied. *Brogan v. Holland*, 105 F.3d 158, 162 (4th Cir. 1997).

If the treating physician rule is superimposed upon these types of specially developed, industry-specific disability rules, the outcomes may bear little resemblance to the expectations of the collective bargaining parties. In *Brogan*, for example, two treating physicians opined that the claimant's disabling stroke occurred while he was on the job. Four examining physicians concluded that the stroke had occurred while he was at home. The court affirmed the trustees' decision to deny the claim based on their assessment of all the evidence in a manner consistent with their established interpretations of the plan standard. *Id.* at 162-63. If the court had applied the treating physician rule, the outcome may well have been different.

The payment of disability benefits to unintended claimants under the treating physician rule will increase the cost of disability benefits and reduce the amount of money available for other collectively-bargained benefits. The split among the

circuits will force inconsistent administration, magnifying litigation costs. Increased litigation costs also reduce the amount of money available for benefits.

These practical effects also apply to disability plans that are not collectively bargained. All disability plans may be required to pay disability benefits to unintended claimants, and plan settlers—employers—may elect to either reduce future disability benefits or decline to improve future benefits. The Ninth Circuit's decision will have the unintended consequence of reducing benefits for all qualified claimants.

Finally, there is no reason to conclude that the views of a treating physician selected by a claimant will be superior to the views of a physician selected jointly by labor and management trustees of a collectively-bargained plan. The NFL Player Retirement Plan retains only physicians who are believed by all to be objective and capable.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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